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THE NATIONAL WATER PERMIT PROGRAM

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U.S. ENVIRONMENTAL PROTECTION AGENCY
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THE NATIONAL WATER PERMIT SYSTEM

Implementation of the National Pollutant Discharge Elimination System pursuant to Section 402 of the Federal Water Pollution Control Act Amendments of 1972

U. S. Environmental
Protection Agency
Office of Enforcement
and General Counsel
Washington, D.C. 20460

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FOREWORD

On October 18, 1972, the Federal Water Pollution Control Act Amendments of 1972 were enacted. One major feature of this sweeping revision of the Federal water pollution laws was the establishment of a new national permit system. Section 402 requires that industrial, municipal, and other point source dischargers obtain permits for the discharge of any pollutants into the navigable waters of the United States, and it provides for a closely knit Federal-State partnership to administer the program.

This program description provides a summary of the main features of the national permit system. It includes the principal aspects of the statute itself, important regulations and guidelines which have been promulgated or are being developed, and major policy directives issued by the Environmental Protection Agency. It also describes the background of the program, including relationships to the Refuse Act Permit Program announced December 23, 1970, and provides other factual information concerning the scope of the program and the manner of its implementation and operation.

The purpose of this program description is to provide information to the public concerning this program. Section 101 of the new law calls for EPA and the States to provide for, encourage, and assist public participation in connection with all activities under the law. In furtherance of the policy of encouraging and assisting public participation, EPA circulated this description in draft form (dated February 7, 1973, and entitled "Explanatory Statement: Implementation of the 'National Pollutant Discharge Elimination System' Pursuant to Section 402, Federal Water Pollution Control Act Amendments of 1972") among citizen organizations and other public groups. Many helpful comments were received and incorporated into this final edition.

This program description is available upon request and will be given a broad distribution. It may be revised from time to time in order to assimilate policy decisions and new developments. It is hoped that interested citizens will take the time to read this description and otherwise learn about and participate in the national effort to reduce and eliminate water pollution. Further copies may be ordered by writing to the Office of Water Enforcement, Permit Program Division, Room 706, Crystal Mall Building #2, Environmental Protection Agency, Washington, D. C. 20460.

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I. Introduction

On October 18, 1972, Congress passed the Federal Water Pollution Control Act Amendments of 1972. It has been acclaimed as "one of the most significant, most comprehensive, most thoroughly debated pieces of environmental legislation ever to be considered by the Congress." It provides new enforcement tools for combating pollution and increased Federal grants for construction of waste treatment facilities, and authorizes additional funds for research into problems and solutions to pollution. Legislated protection of this country's waters is not a new phenomenon. Nor is the new Act's mechanism for controlling pollution, a system of permits for discharges into the waters, a novel regulatory scheme.

A. Prior Water Pollution Control Legislation

The first comprehensive Federal Water Pollution Control Act was enacted in 1948 on a temporary basis and extended in 1952. It became permanent legislation in 1956 and was amended in 1961 to establish a more effective program to abate pollution of navigable as well as interstate waters which endangered the health or welfare of persons. The method of enforcement was a Federal-State enforcement conference, with participation by local officials and other interested persons, to discuss pollution problems of a particular location and to make recommendations about those problems. Public hearing and court action followed the conference if the recommendations were not followed.

In 1965, the FWPCA was again amended, this time by the Water Quality Act. Under it each of the States, the District of Columbia, Puerto Rico, the Virgin Islands and Guam were given the opportunity for the first time under Federal law to establish water quality standards for interstate waters including coastal waters. If a State did not set such standards, the Federal Government did.

Water quality standards were set by classifying bodies of water for different levels of water use such as drinking, industrial water supply, or recreational use. Then the characteristics or criteria which the water had to have to support these uses were specified. A third part of the standards was the plans established to implement and enforce the criteria. When approved by the Federal authority,

such standards (criteria and plans) became the Federal-State standards applicable to those waters.

Any discharge which reduced the quality of the receiving water below the criteria or in violation of an implementation plan was subject to enforcement action. States have always had the primary responsibility for enforcing water quality standards, but, because standards were federally approved and enforceable, the Federal government could enforce them by bringing an abatement suit, after at least 180 days' notice of violation to the dischargers and other interested parties.

Even earlier than the 1948 FWPCA, Congress passed the River and Harbor Act for the protection of the Nation's navigable waterways. Enacted in the late 1800's, this Act provided for the maintenance, protection, and preservation of the navigable waters of the United States, including regulation by means of permits for construction, dredging, and discharges in those waters. Section 13 of the River and Harbor Act of 1899, which by itself is known as the Refuse Act, literally prohibited the discharge or deposit of refuse matter into navigable waters and their tributaries unless authorized by a permit from the Secretary of the Army. The River and Harbor Act also provided enforcement measures, civil and criminal penalties, against any discharger of refuse who had not obtained a permit. Navigable waters, to which the River and Harbor Act applies, are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce.

The Refuse Act, as a section of an Act generally intended to prevent impediments to navigation, was initially used for navigational purposes. In recent times, with rising concern about increased water pollution, the potential use of the Refuse Act for water pollution control was recognized. With a focus on the discharge itself, it was seen as an enforcement tool complementary to the enforcement provisions of the FWPCA, which focused on the quality of the receiving water. The Refuse Act could be used to enforce water quality requirements.

In 1970, the Department of the Interior, then charged with administering the water pollution control program, announced that

the Refuse Act would be utilized more fully, and the Department of Justice issued guidelines for Refuse Act prosecutions against dischargers without permits. The Department of the Army announced its desire to initiate a Refuse Act Permit Program. Finally, by Executive Order on December 23, 1970, the President directed the establishment of a Federal permit program utilizing the Refuse Act, and requiring close coordination between the Army Corps of Engineers and the Environmental Protection Agency to which Federal pollution control activities had been transferred in early December 1970. Effective July 1, 1971, the discharger of any industrial wastes into navigable waters or their tributaries was required to have applied for a permit from the Corps.

The Federal Government thus combined its resources and legal authorities to maximize control over water pollution. In addition to enforcement conferences, 180-day notice proceedings, and civil and criminal Refuse Act prosecutions, a Refuse Act Permit Program was established and functioning for approximately one year.

B. The Permit Program under the Refuse Act

Because the Refuse Act authorized the Secretary of the Army to issue permits for discharges, the Army Corps of Engineers had the primary responsibility of administering the Refuse Act Permit Program. The Corps received applications from dischargers for permits, determined the effect of the discharge on anchorage and navigation and formally issued any permit. EPA reviewed these applications and advised the Corps on the effect of the discharge on water quality. Applicants for a Refuse Act permit also had to receive a certification from the State in which the discharge was to be made that the discharge would not violate water quality standards established under the Federal Water Pollution Control Act. Therefore, before issuance or denial of a permit, the Corps received advice from EPA and the State as to whether and on what conditions the permit should issue.

By December 21, 1971, only 20 permits had been issued under the program. On that date, the new program came to an abrupt halt. A United States District Court judge enjoined the Corps from issuing Refuse Act permits. The injunction in the case, Kalur v. Resor, was based on two grounds. First, the Corps of Engineers acted beyond its authority if it issued permits for discharges into tributaries

of navigable waters. Literally, the Refuse Act only authorized the issuance of permits for deposits into navigable waters, although the Act prohibits discharges and deposits into navigable water and non-navigable tributaries. Secondly, the District Court judge determined that the Corps in issuing permits under the Refuse Act was not exempt from the requirements of the National Environmental Policy Act of 1969. That Act required all Federal agencies undertaking any major Federal action significantly affecting the quality of the human environment to prepare an environmental impact statement for that action. The Court held that until the Corps modified its operating regulations to allow the preparation of impact statements covering water quality aspects of Refuse Act permits, the issuance of permits was to be discontinued. The Government, at EPA's insistence, appealed the Court's decision.

The Kalur decision did not mean the end of EPA's pollution control program. Pending the resolution of issues raised by the Kalur decision on appeal, EPA continued to process the permit applications at hand in preparation for the possible reactivation of the Refuse Act Permit Program or passage of new legislation authorizing the issuance of permits.

At the same time, EPA had to decide how to keep alive the momentum created by the Refuse Act Program and other pollution control statutes. The Agency initiated the Abatement Commitment Letter program which sought, informally, the voluntary commitment of industrial dischargers to commence abatement plans. This program was utilized along with the other enforcement measures so that as of September 30, 1972, 59 enforcement conferences had been undertaken, 166 180-day notices had been served, some 100 abatement letters were signed and 405 civil and criminal actions had been initiated from December 2, 1970, to September 30, 1972.

II. The FWPCA Amendments of 1972

A. Objectives of the Act

The Refuse Act Permit Program was still enjoined in October of 1972 when Congress enacted the FWPCA Amendments of 1972 providing a new comprehensive program of pollution control. As stated in the 1972 Act, it is the national goal that the discharge of pollutants

into navigable waters be eliminated by 1985, and that, as an interim goal whenever attainable there be achieved by July 1, 1983, water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water. The 1983 goal is an objective which carries with it defined, specific enforcement mechanisms while the 1985 goal is an ideal toward which Congress intended the country to strive. To reach these goals, the Act requires that a discharge of waste or of waste-containing water be of a specified, improved quality before its release from a point source to the receiving water, or in some cases that the discharge be prohibited. To assure that the improved quality is attained, the Act provides a new authority to the Federal and State governments to continue and fully develop a national permit system.

B. Major Changes

1. Enforcement Mechanisms Replaced

The new Act terminates the use of enforcement conferences and 180-day notices and ends the Refuse Act Permit Program. It gives immunity from prosecution under certain key sections of the Act, or under the Refuse Act until December 31, 1974, to any person who has applied for a discharge permit, if the application has not been processed and if the discharge is one susceptible to a permit.

2. Jurisdiction

The new Act has jurisdiction over all navigable waters as does the Refuse Act, but, as defined by the Act, navigable waters mean "the waters of the United States." Included are all interstate waters, all navigable waters, tributaries of navigable waters and any intrastate non-navigable rivers, streams, or lakes utilized by industries in interstate commerce, or utilized by interstate travelers for recreational or other purposes. The Act also applies to the territorial seas (the belt of seas extending three miles from the coastline), to the contiguous zone (the high seas contiguous to the territorial sea but not to extend beyond 12 miles from the coastline), and to the ocean beyond the contiguous zone.

3. Key Definitions

The Act specifically defines pollutants and point source. Pollutants are dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water. Point sources are "discernible, confined and discrete conveyances" which means, for example, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container rolling stock, vessel, or confined animal feeding facility.

4. National Pollutant Discharge Elimination System

The new permit system is called the National Pollutant Discharge Elimination System (NPDES). It is a national system because it is effective nationwide and involves Federal and State participation, with the objective being State-administered permit programs.

Full implementation of the program by States may take time. Before then, the Act provides for either a limited life interim State program or a Federal permit program. After a State has implemented a NPDES permit program, Federal review and monitoring of the program will continue to insure that the purposes of the Act are carried out. Thus, the program is based on an effective Federal-State partnership.

The scope of activities regulated under the permit authority is wide. Some 40,000 of the Nation's 300,000 industrial water users will be subject to direct permit regulation. Municipal waste treatment sources are also point sources at which this pollution control program is aimed. Between 10,000 and 13,000 communities will be affected. Discharges from agricultural sources are, under certain circumstances, subject to the new permit authority. Some examples are the animal wastes from concentrated, confined feedlots which reach surface water, and irrigation return flow when discharged from channels, drains, or other conduits. Acid mine drainage from both surface and subsurface coal mines, where such drainage is from discrete conveyances, will be regulated. Discharging oil rigs, whether onshore or offshore, are also included.

5. Specific Effluent Limitations

A major revision from prior legislation is the requirement that specific limitations must be applied to discharges. Limits are placed on the amount of pollutants in discharged wastewater or on the volume of wastewater discharged or the number and amount of solid waste discharges. This is one of the Act's principal methods for attaining the 1983 and 1985 goals.

C. A New Regulatory Scheme Established

Any permit issued under the National Permit System will impose on a discharger of pollutants from a point source certain requirements designed to attain the goals of the Act: Every discharger must make application for a permit and in so doing provide the permitting authority with data on the discharge. Each issued permit will contain conditions which will insure that the discharge will meet effluent limitations, including schedules of compliance, water quality standards, new source performance standards for new plants and factories, and toxic standards. Facilities discharging into a municipal waste treatment facility do not require a discharge permit, but the discharger must comply with pretreatment standards promulgated under the Act. Many permits will require the discharger to monitor the discharge, to keep records of monitoring activities and report periodically on what is occurring in regard to the discharge. Throughout the permit issuing process, there is to be opportunity for extensive public participation: Public notice, designed to inform all interested parties, will be given of each proposed permit. In many cases, especially if there is significant public interest, open public hearings must be held to explore all issues raised concerning the proposed permit. Each of these elements of the new system will be more fully discussed hereafter.

III. Requirements of the New Act

A. The Effluent Limitations

Prior pollution cont[illegible] statutes did not specifically provide for effluent limitations, but the Federal Government's pollution control program did. Recognizing the need for standard discharge limits within industrial categories, the Agency contracted for research and studies to determine what secondary treatment or its

equivalent was for 22 basic industries. EPA's enforcement personnel used these studies in part to develop a draft of effluent guidance for the 20 industrial categories which contributed to a high percentage of industrial pollution. This proposed effluent guidance received Agency-wide review and was commented on by industry technical personnel. The effluent guidance was distributed to the ten EPA Regional Offices to be used as a guide in the development of conditions for Refuse Act permits.

The guidance had two separate categories of numbers. The first category of numbers represented the Agency's best determination of "best practicable control technology," a term present in the new Act, and one which will be explored later. An industry had to apply to its discharges by January of 1976 (as now applied, July of 1977) treatment which made use of the "best practicable control technology." If a discharger had already begun a substantial treatment program which would be complete by July 1, 1974, a second level of less stringent limitations was applicable initially, with the more stringent numbers to be applied upon reissuance of the permit. In addition, social, economic, and other factors were to be considered in applying the guidance.

The new Act also provides for uniform effluent limitations for industrial categories and achievement dates. Congress set two interim dates of July 1, 1977, and July 1, 1983, by which different levels of treatment are to be reached. It is a timetable based on advances in technology.

1. General Effluent Limitations

For all dischargers other than publicly owned treatment works, not later than July 1, 1977, effluent limitations are to be achieved which represent the application of the "best practicable control technology currently available." At the same time, all publicly owned waste treatment facilities must utilize "secondary treatment" and, if an industrial discharger sends its wastes through a publicly owned treatment works, certain "pretreatment standards" must be met. An additional requirement is that by the July 1977 date, effluent limitations may be imposed so that any State law will be met. Not later than July 1, 1983, effluent requirements must be met which represent the "best available technology economically achievable," and, for publicly owned waste treatment facilities, which represent

the application of the "best practicable waste treatment technology." Any other applicable pretreatment standards must also be attained by that date. Special standards for toxic substances must also be observed for both the 1977 and 1983 periods.

The target dates are 1977 and 1983—they are the outside limits for compliance. The Act envisions that in meeting effluent limitations there will be stages of compliance including attainment of levels of substantial improvement even before these dates. There will be imposed on discharges a schedule of remedial measures. This schedule will appear as conditions set out in a NPDES permit.

a. Best Practicable Control Technology and Best Available Technology

The Act charges the Administrator with the task of publishing regulations providing "Guidelines" for effluent limitations for point sources after he has consulted with appropriate Federal and State agencies and other interested persons. These effluent limitations are the ones which shall require the application of the best practicable control technology currently available for the 1977 target date and best available technology economically achievable for the 1983 target date. The Administrator will identify three things in the regulations.

First, he will interpret and give meaning to the terms "best practicable" and "best available" when applied to various categories of industries. In defining "best practicable" and "best available" for a particular category, he is to take into account such factors as the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of control techniques, process changes, and non-water quality environmental impact (including energy requirements). In assessing "best practicable control," the Administrator is to make a balancing test between total cost and effluent reduction benefits. In some instances, this test may eliminate the application of technology which is high in cost in comparison to the minimal reduction in pollution which might be achieved. Cost is also a factor in determining "best available." "Best available" technology is the highest degree of technology that has been demonstrated as capable of being designed for plant scale operation, so that costs for this treatment may be

much higher than for treatment by "best practicable" technology. Yet economic feasibility will also be a factor in interpreting "best available" treatment. Cost effectiveness for either standard is to be confined to consideration of classes or categories of point sources and will not be applied to an individual point source within a category or class.

Second, having interpreted "best practicable" and "best available" the Administrator is to promulgate guidelines which will be the formula for determining what "effluent limitations" are to be imposed on dischargers. In these guidelines, he is to identify the degree of effluent reduction attainable through the application of the best practicable control and best available technology in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants. These guidelines can then be applied in setting specific effluent limitations on dischargers.

Third, the regulations are to identify control measures and practices to eliminate the discharge of pollutants.

b. Effluent Limitation for Publicly Owned Treatment Works

Not later than July 1, 1977, publicly owned treatment works must meet effluent limitations based on "information" which the Act requires the Administrator to publish. The "information" is to describe the degree of effluent reduction attainable through application of secondary treatment. The information will be in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants.

The Administrator is also required to publish information on alternative waste treatment management techniques and systems available, as the basis for the 1983 effluent limitations. The "information" issuances serve as the base for determining the limitations.

c. Pretreatment Effluent Standards

In view of the Act's requirement that discharges from private point sources into publicly owned treatment works are to comply with applicable pretreatment effluent standards by 1977 and 1983, such

standards have to be set by the Administrator. He is to publish proposed regulations setting these standards and soon thereafter promulgate them. The pollutants covered are those which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such works. The regulations must specify a time for compliance not to exceed three years from their promulgation. The Administrator is to designate the category or categories of sources to which such standards shall apply. Pretreatment effluent standards may be more stringent for 1983 since the standards are to be updated from time to time.

d. Toxic Pollutant Effluent Standards

The 1972 Act requires the Administrator to establish effluent standards or prohibitions controlling toxic pollutants. Toxic pollutants are defined as those pollutants, or combinations of pollutants which after discharge and upon exposure to any organism either directly or indirectly, will "on the basis of information available to the Administrator" cause death, disease, or other abnormalities in the organism or its offspring. The drafters of the Act had in mind certain substances such as mercury, beryllium, arsenic and cadmium.

The Administrator is to issue a list of toxic pollutants and then establish standards for those toxic pollutants listed. In determining effluent standards for those toxic pollutants which he designates as toxic, the Administrator is to consider the pollutants' toxicity, persistence, and degradability, as well as the presence of organisms in any affected waters. The Administrator is to designate categories of sources to which the standards shall apply. The standards are to go into effect no more than one year after their promulgation. This means that dischargers must be in compliance within the same time period. The standards are to be reviewed at least every three years and may be revised at any time.

Because of the dangerous nature of toxic materials, the Act authorizes State and Federal authorities to place controls on the discharge of toxics even before the promulgation of toxic standards. Either through permit conditions or other enforcement measures, toxic discharges will be regulated in accordance with the objectives of the toxic pollutant discharge control provision.

2. New Source Performance Standards

Most new factories, industries, etc., will be subject to national standards of performance. EPA is to publish a list of categories of sources which must include 27 major types of industry and then issue regulations establishing Federal standards of performance for the new sources within such categories. These standards are to assure that new stationary sources of water pollution are designed, built, equipped and operated to minimize the discharge of pollutants. The standards are to reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives. "Best available demonstrated technology" has been described as those plant processes and control technologies which, at the pilot plant or semiworks level, have demonstrated that both technologically and economically they justify the making of investments in new production facilities.

At the same time EPA promulgates new performance standards, it is to provide pretreatment standards for newly constructed point sources discharging into public treatment facilities.

3. Water Quality Standards

The new Act does not ignore the concept of water quality standards in 1977 and 1983 achievements. Water quality standards which were adopted and enforced under the old FWPCA for interstate waters are continued in effect and can be updated, and new ones are to be established for intrastate water bodies where not previously adopted by the States. If water quality standards cannot be protected by the application of best practicable control technology for industries and secondary treatment for municipal wastes before 1977, then effluent limitations must be achieved which will protect water quality standards. Before 1983 if best available treatment and its equivalent for municipal facilities will not contribute to attainment of water quality which will protect public water supplies, agricultural and industrial uses, protection of a population of fish and wildlife, and allow recreational activities, more stringent effluent limitations are to be imposed.

An overall view of the conditions of the waters and of the discharges therein will be provided in a report which is to be prepared

for Congress on or before January 1, 1974. This water quality report will include an inventory of all point source discharges and will identify which navigable waters are of the quality, or can reach the quality by 1977 or 1983, that provides for protection of fish and shellfish populations and allows recreational activity.

B. Other Provisions of the 1972 Amendments

1. Special Permit Programs

Several special (non-NPDES) permit programs are established by the new Act. The Administrator of EPA may permit discharges of pollutants associated with approved aquaculture projects. The Secretary of the Army in conjunction with the Administrator of EPA may issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites. In addition, the disposal of sewage sludge resulting from the operation of a treatment works which causes pollutants from the sludge to enter navigable waters is prohibited except in compliance with a permit issued by a State or by the Administrator of EPA.

2. Discharges Regulated other than under Permit Authority

Certain other discharges of pollutants from point sources are not controlled by the Act's permit systems, but are controlled by some mechanism under the Act. Sewage which is discharged from vessels, clearly a point source, is the subject of a special provision dealing with the design, manufacture, installation and use of marine sanitation devices.

Additions of other pollutants to the contiguous zone or ocean from vessels and other floating craft are excluded from the permit authority, but are not totally free of regulation. The Act creates liabilities for spills of oil and spills of hazardous substances from vessels and from onshore and offshore facilities into navigable waters and waters of the contiguous zone. In the ocean waters, including the territorial seas and contiguous zone, vessels are subject to another statute, the Marine Protection, Research, and Sanctuaries Act of 1972, which also has a permit program.

Permits for discharges from point sources must reflect consideration of toxic pollutants, but, since some toxic pollutants may be

prohibited altogether by the Administrator and any "source" is subject to toxic limitations, regulation goes beyond compliance with a permit. Enforcement actions such as court suits, fines and penalties are envisioned when toxics are being, have been, or will be discharged from both point and non-point sources.

Discharges associated with "secondary recovery" in the production of oil and gas are excluded from the permit program. This exclusion includes water, gas, or other material which is injected into a well to facilitate the production of oil or gas, or water derived in association with oil and gas production and disposed of in a well. Yet this activity is not beyond regulatory control. The wells so used must have been approved by the State in which the well is located and the State must have determined that the injection or disposal will not result in the degradation of ground or surface water resources.

3. Categorically Prohibited Discharges and Unregulated Discharges

Congress has provided that it is unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters. No permit or exception can be given to such discharges. On the other hand, discharges from properly functioning marine engines are not expected to be treated as unlawful or to be regulated. No section of the Act specifies this exemption, but Congress, in discussing the bill, said they intended this exception.

As a policy matter, EPA has excluded certain discharges from the requirement of an NPDES permit. These include discharges from storm sewers when the discharges are uncontrolled and composed entirely of stormwater and most discharges of shower, laundry and galley wastes from vessels. In addition, EPA has excluded from the requirement of a permit nearly all agricultural and silvicultural activities except animal confinement facilities of certain proportions, certain types of fish and aquatic animal production facilities, and irrigation return flow to navigable waters from point sources involving 3,000 acres or more of irrigated land. The Agency decided to exclude the numerous minor agricultural projects because the pollution problems are small in relation to the administrative problems of processing the vast number of agricultural discharge application forms.

On the other hand, these exclusions do not allow the more substantial agricultural projects which do create pollution problems to go unregulated.

Finally, pollution from non-point sources is not specifically regulated by the Act, except where a special provision, such as for disposal of dredge and fill materials, so provides. However, Congress' concern about non-point sources of pollution is shown in that, among other things, it directed the Administrator to provide information and guidelines which will identify and evaluate problems associated with such sources of pollution.

IV. The National Permit System

The Environmental Protection Agency was given three important jobs to do under the new Act in establishing the NPDES: (1) to authorize or reject requests for interim State permit programs; (2) to approve or disapprove final State permit programs; and (3) to administer any permit program not State-operated.

A. Interim State Programs

From October 18, 1973, the date of enactment of the new Act, until March 19, 1973, a State could receive interim authority to administer a State permit program. During that time, the Administrator of EPA authorized 18 States to issue NPDES permits for discharges into navigable waters within the jurisdiction of the States.

The Administrator of EPA was to grant interim authorization to a State, which he determined had the capability of administering a permit program which would carry out the objective of the Act. This standard was the only criterion set forth in the Act relating specifically to interim authorization—whether the State's program met the objective of the Act. The objective of the Act, as it relates to permit requirements, is the prohibition of discharges which are not in conformance with effluent limitations, water quality standards, schedules of compliance, etc., provided for in the Act. In particular, the permits issued under interim State programs were to impose effluent limitations which represented application of "best practicable control technology currently available" for industrial sources and secondary treatment for municipal sources, or compliance with applicable water quality standards, whichever was more stringent, by July 1977. The State had

to have the capability of imposing these requirements through its existing permit program.

B. Final Approval of State Permit Programs

The grant of interim authorization was to be a step toward final approval where the State desired to administer the permanent NPDES. The Administrator must approve a permanent program submitted by a State (or interstate agency, where appropriate) unless he determines that the State does not possess adequate legal authority in State law to perform certain acts. The State program must also provide for certain procedural steps.

1. Authority

The State must have authority to (a) issue permits for terms not exceeding five years; (b) adequately notify members of the public, other States, and the Secretary of the Army of pending permit applications; (c) abate violations or permits, with authority to impose civil and criminal penalties; (d) insure that the State permitting agency receives adequate notice of new introductions of pollutants of substantial changes in the volume or character of pollutants introduced into publicly owned treatment works, and (e) to insure that any industrial user of publicly owned treatment works complies with pretreatment effluent standards and other requirements. The State also must have an approved continuing planning process before approval of its permit program can be granted.

2. Minimum Procedural Elements

In addition to legal authority, a State permit program cannot be approved unless it conforms to certain guidelines prescribing procedural steps and other program requirements. The Act directs that these guidelines must include, but are not limited to, monitoring and reporting requirements (including procedures to make information available to the public), enforcement provisions and requirements for funding, personnel qualifications, and manpower.

These guidelines were issued in final form in the Federal Register on December 18, 1972. Their development began more than a year earlier when EPA, in anticipation of the new Act, invited a

group of State representatives to develop the required guidelines in cooperation with the Agency. Throughout a series of drafting sessions, the work group focused its efforts on three main areas of concern: State authority, State resources, and State procedures. The preparation of these guidelines was dictated by the need to fashion a strong and uniform national permit program with State procedures consistent with and as strong as the Federal program, without being unduly costly, time-consuming, or burdensome to States.

The work group was not concerned with past performances of particular State programs. The new Act contemplates an opportunity for even the weakest State program historically to wipe the slate clean. Nor were the guidelines designed to allow a certain number of existing State programs to qualify or to otherwise relate to existing State legal authority.

The guidelines contain the following requirements:

a. A State must have a statute or regulation which prohibits the discharge of pollutants.

b. There must be basic procedures for the filing of permit applications and the exchange of information between Federal and State agencies all aimed at the goal of obtaining adequate data about the discharge.

c. The State or interstate agency is to formulate tentative views on conditions for the permit being sought, draft a proposed permit and then provide for notice and public participation in the decision-making on that permit. The choice of methods for public notice of a permit application include posting a notice in public places, newspaper publications and mailings to interested groups. Other appropriate government agencies are to be notified. The agency is to receive the written comments of any interested party and the written views and recommendations of other government agencies.

d. An opportunity must be given for the applicant, any affected State or country, or interstate agency or EPA, or other government agency, or any interested persons to request a public hearing. After notice has been given, the hearing

is to take place in the geographical area of the proposed discharge, or other suitable place.

e. The procedures of the State or interstate program must insure that each permit issued will be conditioned with effluent limitations, other standards and limitations, or prior to promulgation by EPA of standards and limitations, effluent conditions designed to achieve the requirements of the Act.

Permits must provide that these requirements will be achieved by means of appropriately scheduled or phased compliance. Generally, the requirements are to be met not later than July 1, 1977, the target date.

f. A State or interstate agency cannot issue a permit for discharges of warfare agents or high-level radioactive waste, or a discharge which the Secretary of the Army has found will substantially impair anchorage and navigation, or a discharge to which the EPA Administrator has objected in writing, or a discharge in conflict with a plan approved under an areawide waste management provision.

g. Procedures of the State program must allow for requirements in permits dealing with monitoring, recording and reporting. Permittees may have to install, maintain and use monitoring equipment or methods to measure such factors as flow and composition of the discharge.

h. The State must be able to modify, suspend or revoke permits and must have the powers and procedures necessary for recourse to criminal, civil and civil injunctive remedies. Maximum civil penalties and criminal fines recoverable at the State level are to be comparable to similar maximum amounts recoverable at the Federal level, or represent an actual and substantial economic deterrent.

i. A State or interstate agency in submitting its program for approval must provide information about the manpower and resources of the State program. Relevant considerations are the number of employees, their qualifications and functions, the costs of administering the program

and funding available for such costs and a description of the kinds and number of industries under the State's jurisdiction.

As part of the structure of many State or interstate agencies, designated boards or bodies will approve NPDES permits. The State or interstate agency must give assurances that no member of the approving board or body, including the Director, will be a person who receives or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders. "Significant portion" has been interpreted to mean 10% of gross personal income for a year.

j. Participating State programs must have procedures to control the disposal of pollutants into wells. Where the applicant has proposed well disposal as a way to meet terms of a proposed permit, the State must prohibit the proposed disposal or condition the permit with terms to prevent pollution of ground and surface water and protect public health and welfare.

C. Federally Operated Permit Program

The Act contemplates that the Administrator of EPA will issue permits in the early phase of the NPDES program and even beyond that if a State does not apply for or receive either interim authorization or approval of its permit program. In these cases, EPA will begin the process of issuing permits in coordination with the States.

The Act authorizes the Administrator to issue permits for the discharge of any pollutant or combination of pollutants upon the conditions that such discharge will meet all applicable requirements of the Act relating to effluent limitations, water quality standards, other effluent standards, inspections, monitoring and guidelines establishing ocean discharge criteria. Even before these standards and limitations are established, he can issue permits conditioned in any way he determines as necessary to carry out the provisions of the Act. Since it will take dischargers some time to bring their facilities into compliance, the Agency has decided to begin issuing permits to get dischargers onto abatement schedules right away so that the 1977 requirements can be met. In addition, the Agency already

has some indications of the effluent reductions which the final standards and limitations will represent. The effluent guidance which was developed for use in the Refuse Act program will, where applicable, be used as the basis for setting the effluent limitations before final promulgation of such limitations and standards. The Agency will also issue permits before promulgation of all the effluent standards and limitations in those cases where the water quality standards are known and dictate the effluent limitations to be imposed.

The procedures to be followed by EPA in processing and issuing permits were published in the Federal Register on May 22, 1973. With the exception of such subjects as manpower and resources, and disposal of pollutants in wells, over which the States have authority, the regulations for the Federal permit program provide for the same or stricter requirements than the guidelines for State programs.

After determining which applications will require EPA's issuance of a permit, the Agency will prepare and issue public notice as to those applications. Interested persons may submit written comments during the 30-day period following the issuance of public notice. Unless hearings are held as described below, after this comment period a permit will be issued or denied.

If the Regional Administrator finds there is significant public interest, he may call a general public hearing on any permit or group of permits. Any proposed permit or permits considered at the hearing may thereafter be denied, or issued, or modified on the basis of information presented at the public hearing with notice of such action to hearing participants.

An adjudicatory hearing may be the next step after action is taken on a permit considered at a public hearing. If within 20 days following notice of issuance or denial of a permit considered at a public hearing or, when the public hearing is not held, within 30 days following the public notice of the permit application, a person having an interest which may be affected by the issuance or denial of the permit submits a request to the Regional Administrator, a formal adjudicatory hearing will be held. This hearing may include the submission of oral and written statements or testimony by witnesses with cross-examination. Public notice of both the public hearing and the adjudicatory hearing must be circulated 30 days before the hearing in a way which will inform any potentially interested person.

Following the adjudicatory hearing, the presiding officer of the hearing will certify the record, including findings and conclusions proposed by the parties, to the Regional Administrator who will consider the record and issue a tentative decision. After a period of time in which the parties may submit exceptions to the tentative decision, he will issue a decision which will be the final Agency decision unless it is appealed to the Administrator by any party.

One step is exclusive to the Federal permit program. The Act requires that an applicant for a Federal license or permit, and in this case for a permit to discharge, must provide the licensing or permitting agency with certification from the State in which the discharge originates. The State is to certify that the discharge will comply with the basic requirements of the Act, such as the effluent limitations, water quality requirements, new source performance standards, toxic standards and pretreatment standards. The certification must also set forth any effluent limitations necessary to assure that the applicant will comply with any appropriate requirements of State law. The State is given a reasonable time, which the Agency has interpreted to mean generally three months, but in no event more than a year, to provide its certification. If the State denies certification, a Federal NPDES permit cannot issue.

EPA has adopted the policy that it will issue permits on a basis of priority. The major industrial and municipal dischargers that account for a high percentage of the total pollution load going into the Nation's rivers and lakes are first priority for the establishment of abatement programs under the new legislation. The same priority is placed on permits for discharges into waters for which the water quality standards are known.

The fee application schedule used by the Corps of Engineers in the Refuse Act Permit Program has been adopted by EPA for its permit program except for minor dischargers. As required by the Corps, each applicant for a permit paid a fee of $100 and $50 more for each discharge point in excess of one. For minor dischargers (generally those who discharge less than 50,000 gallons per day), a fee of $10 will be charged. These schedules were adopted by EPA pursuant to Section 483(a) of 31 U.S.C., and do not apply to permits when the issuing authority is vested in a State. If the State has permit authority, the appropriate State fee will be applied.

V. Scope of Federal Review Authority over State Programs

The role of the Federal Government in the national permit system does not end with the approval of a State program. EPA may retain the right to review individual permits and may even withdraw approval of a State program if a State fails to carry out the requirements of the Act.

A. Review of Individual Permits

When a permit is to be issued under an approved State program, the Administrator can object to its issuance on two grounds. First, his objection may be based on notification to him from a permitting State that another State whose waters may be affected by the issuance of the permit has made recommendations concerning the permit and that the permitting State has not accepted those recommendations for certain reasons which it provides to the Administrator. Second, he may object that such permit will be outside the guidelines and requirements of the Act.

The Administrator may waive his right to review individual permit applications. He may also, at the time he approves a State plan, waive the right to review all permits to be issued by that State for whole categories and classes of discharge sources. He is also to establish regulations setting out the classes and categories of point sources for which he will waive permit-by-permit review in any State that has received final authority.

B. Review of Total State Program

In addition to the Administrator's review of individual permits, he has the power to take over a whole State permit program. Whenever the Administrator determines, after holding a public hearing, that a State is not administering its approved program in accordance with the Act, he is to notify the State that the program is not functioning properly. If the State does not take corrective measures within ninety days, then the Administrator is to withdraw his approval of the program after he notifies the State of this decision and has publicly, and in writing, made known his reasons for withdrawing approval. The Administrator is not to take such action except upon a clear showing of failure by the State. The administration of the permit program will thus revert to the Federal Government.

VI. Enforcement

A. Federal Enforcement of Conditions of Individual State Permits

After State permits have been issued either under interim or final programs, Federal power may be exercised to enforce them. The thrust of the new legislation is to give the States the primary responsibility for enforcing the permits they issue, but there are circumstances in which the Administrator may assert his authority. If the Administrator determines that a violation of a State permit is occurring, he may either take direct enforcement action or he may notify the permittee and the State that a violation has occurred and, if the State does not act within 30 days of notification, he can proceed to take direct enforcement action. Any time the Administrator takes such action he must immediately notify the State.

B. Federal Enforcement—All State Permits

As with a State permit program not being administered properly, if the Administrator finds that violations of permit conditions are so widespread that such violations appear to result from a State's failure to enforce its permits, there will occur what is called "federally assumed enforcement." Full Federal assumption of enforcement powers for a State will happen if the following occurs: the Administrator receives information of widespread violations within a State, he notifies the State and waits 30 days to see if the failure is corrected and, if he finds that the failure has not been corrected and that he must assume enforcement, he gives public notice. This period of Federal enforcement will last until the State satisfies the Administrator that it will enforce its permits.

C. Types of Federal Enforcement Actions (Federal and State Permit Conditions)

The direct Federal enforcement actions, mentioned above, to remedy violations of permits, are actions which may be taken whether the Administrator is enforcing conditions of a Federally-issued or a State-issued permit (interim or final). Whenever the Administrator "finds on the basis of information available to him" that a person is violating effluent limitations, water quality limitations, new source performance standards, toxic or pretreatment standards, any inspection,

monitoring or entry requirements or any condition of a permit such as scheduled compliance dates, he is obliged to either issue an order requiring the discharger to comply or bring a civil suit for appropriate relief. Such a civil action would include a permanent or temporary injunction and civil penalties. Dischargers who violate permit conditions are also subject to criminal penalties.

If the Administrator elects to issue a compliance order instead of bringing a court action, and if the order is not obeyed, the Administrator may bring a civil action for injunctive relief to enforce his order or seek civil penalties for the violation of his order. Any civil actions undertaken by the Administrator may be brought in the United States District Court for the district in which the discharger "is located or resides or is doing business."

VII. Public Participation and Citizen Suits

In the development of the guidelines or standards required to be promulgated by EPA, the Act contemplates public participation through comments or hearings and also participation by other interested government agencies or groups in advisory capacities. As discussed earlier, the public is to take a significant role in the permit process. All documents relating to a proposed permit such as applications, fact sheets, draft permits, comments thereon and other information are to be readily available to the public for inspection. Moreover, public hearings may be sought by any person who has an interest which might be affected.

This involvement of the public in the national permit program is only one part of the broad program of citizen participation which Congress called for in the new water pollution control legislation. The Act requires EPA, in cooperation with the States, to develop regulations describing the required minimum contents of programs for public participation in all aspects of State and Federal water pollution control activities. These regulations which are called "Public Participation in Water Pollution Control Programs," are to insure public involvement in developing and enforcing <u>any</u> regulation, standard, effluent limitation, plan or program established by the Administrator or any State under the Act.

These regulations will require EPA and State agencies to provide methods for (1) disseminating program, policy and technical information

at times and places useful to the public; (2) giving assistance to public groups for citizen education and training; (3) consulting and exchanging views with interested persons; (4) giving notice of proposed action; (5) keeping a central public collection of data pertinent to the geographic area of the agency; (6) receiving and evaluating reports of violations submitted by the public; (7) informing the public about legal proceedings under the Act (to the extent not prejudicial to the conduct of the litigation); and (8) affording opportunities to the public for public hearing and comments on proposed regulations. Guidelines for the conduct of public hearings are also part of the regulations, as are many other provisions relating to public involvement.

Citizens are given the right to bring a civil suit under the new Act against any person who is alleged to be in violation of an effluent standard or limitation (which includes violation of a permit condition) or of an order issued by the Administrator or a State in regard to such limitation or standard, or against the Administrator where he allegedly fails to perform any nondiscretionary act or duty. Under the Act, citizen is defined as "a person or persons having an interest which is or may be adversely affected," and "person" is defined to mean "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." According to relevant legal interpretation, a citizen plaintiff must be a person with an interest that is or may be adversely affected <u>in fact</u>; a generalized but unaffected interest in the environment would not be sufficient to give a citizen standing to sue under the Act.

Persons who can be named as defendants in a citizen suit include the United States and any other governmental agency to the extent permitted by the Eleventh Amendment to the Constitution. The suit shall be brought in the district court without regard to the amount in controversy or the citizenship of the parties. In addition to granting injunctive relief, the courts are authorized to apply any appropriate civil penalties of the Act.

A citizen suit against violators of the basic effluent requirements cannot be brought, however, until after June 30, 1973. The seven-month moratorium was designed to give EPA and the States time to institute an NPDES permit program and to give dischargers an opportunity to file an application for a permit.

A citizen may sue the Administrator for failure to perform non-discretionary acts such as meeting a deadline in establishing regulations or standards or in preparing studies or reports. If the Administrator fails to take enforcement action after he finds that a violation of the Act has occurred, he is also subject to a citizen's action.

If a citizen is going to bring an action in any of these circumstances, the citizen must give at least 60 days notice (except for violation of toxic or performance standard requirements) prior to commencement of the action (1) to the Administrator, (2) to the State in which the alleged violation occurs, and (3) to the alleged violator. A separate suit may not be brought by a citizen if the Administrator or the State has commenced and is diligently prosecuting a civil or criminal action to require compliance with the violated standard, permit condition, or order.

VIII. Other Questions and Answers

A. What is the effect of the new Act on pending Refuse Act applications and permits?

Under the new Act, each application for a permit under the Refuse Act pending on the date of enactment is considered an application for a permit under the new Act. All permits previously issued under the Refuse Act are considered to be permits issued under the new Act.

B. What permit authority will be exercised over thermal discharges?

The Administrator will be establishing effluent limitations on thermal discharges as part of the general effluent limitations and, for new sources, as part of the performance standard. If the owner or operator of a point s rce, after opportunity for public hearing, satisfies the Administrator (or the State, where appropriate) that the effluent limitation proposed for a thermal discharge is more stringent than necessary to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife, the Administrator (or State) may impose a different limitation which will still provide that protection.

C. Are industrial users of publicly owned treatment facilities required to obtain a permit? What control is placed on such indirect discharges?

Individual industrial users of publicly owned waste treatment facilities are not required to obtain NPDES permits. However, each municipal facility is required to include in its application for a permit a separate section for each major industrial facility which uses the municipal system. The municipal permittee is to require any industrial user of the system to comply with pretreatment standards and certain monitoring and reporting requirements. EPA or the State agency, as the issuer of the permit to the public facility, is to be notified by the public facility of any changes in the volume or constituency of the discharge from the industrial user.

D. Can a State ever apply standards or requirements to its permits other than the Federally promulgated ones?

If the Administrator gives his approval, a State may apply its own standards and regulations applicable to new source performance standards, sewage sludge disposal, and discharge monitoring and reporting thereof, as long as they are as stringent as the Federally promulgated one. In addition, the Act provides that a State may enforce any effluent limitation, schedule of compliance, or any other requirement more stringent than Federal requirements, and may enforce requirements in areas, such as facility design, to which Federal jurisdiction and standards do not extend. These rights of the State to enforce more stringent standards do not depend on the Administrator's approval.

E. Does the scope of the new Act's jurisdiction include ground water?

To a limited extent, ground water is a subject of the new Act. State control over the disposal of pollutants into wells may involve the protection of ground waters. The Federal Government is charged with developing comprehensive programs for preventing, reducing, or eliminating the pollution of ground waters and underground waters.

Whereas the States are required to have the authority to issue permits to control the disposal of pollutants into wells, the Federal

Government will exercise such control only where a well disposal is proposed as part of a program to control a discharge to navigable waters. The drafters of the new Act considered providing full authority to both the Federal Government and the States but determined that State law was or could be made sufficient to control deep-well disposals.

F. May individual exceptions be made to the application of the "best available technology" requirement?

In addition to the variance relating to thermal discharges, the Administrator may modify the requirement for application of the "best available technology economically achievable" with respect to any point source for which an application is filed after July 1, 1977. The applicant must make a satisfactory showing to the Administrator that such modified requirements will (1) represent the maximum use of technology within the economic capability of the applicant and (2) will result in reasonable further progress toward the elimination of the discharge.

G. Are facilities operated by the Federal Government subject to regulation in the new Act?

Every Federal department, agency, or instrumentality which has jurisdiction over any property or engages in any activity resulting in the discharge of pollutants shall comply with any Federal, State, interstate or local pollution control requirements to the same extent that any person must comply. The President can exempt an executive agency if it is in the paramount interest of the United States. But no exemption can be granted from the requirements of pretreatment or toxic effluent standards, or the new source performance standards. Federal facilities will apply for and obtain NPDES permits only from EPA even after approval of a State program. Also, discharges from Federal facilities do not require State certification as is required of other discharges for which EPA may propose NPDES permits.